Supreme Court, U.S.
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No. 97-726 (2)

In The

Supreme Court of the United States

October Term, 1997

ARLENE REYNOLDS,

Petitioner,

vs.

CSX TRANSPORTATION, INC., A Virginia Corporation, and ROGER WIDNEY, a Supervisory Employee of CSX Transportation, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CSX TRANSPORTATION, INC.

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QUESTIONS PRESENTED

1. Whether this Court will grant certiorari in a hostile work environment sexual harassment case to consider an "agency" theory when the theory was not raised to or decided by the court of appeals, the court of appeals' opinion does not conflict with another circuit, and the facts presented would not support an "agency" theory.

2. Whether this Court will grant certiorari to consider Petitioner's contention that punitive damages must be assessed against an employer under 42 U.S.C. § 1981a in a case where the only plausible "malicious" or "reckless" acts were those of a first level supervisor, there is no conflict among the circuits on the issue, and the court of appeals' decision was correct as demonstrated by its application of the law to the facts.

3. Whether this Court will grant certiorari to review Petitioner's claim that the court of appeals made erroneous factual findings.

STATEMENT PURSUANT TO RULE 29.6

The following is the parent of respondent CSX Transportation, Inc.: CSX Corporation.

The following are the nonwholly owned subsidiaries of respondent CSX Transportation, Inc.: Allegheny and Western Railway Company; The Baltimore and Cumberland Valley Rail Road Extension; The Central Railroad Company of South Carolina; The Cincinnati Inter-Terminal Railroad Company; The Cleveland Terminal & Valley Railroad Company; Dayton and Michigan Railroad Company; The Home Avenue Railroad Company.

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Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals dated June 20, 1997 is reported at 115 F.3d 860. Its order denying rehearing dated July 28, 1997 is not reported.

STATUTES INVOLVED

This case concerns 42 U.S.C. § 2000e-2(a)(1) which provides that:

> it shall be an unlawful employment practice of an employer —
>
> > to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. because of such individual's race, color, religion, sex or national origin.

and 42 U.S.C. § 1981a(b)(1), which provides:

> a complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT OF THE CASE

Reynolds misstated or omitted a number of critical facts and procedural matters that are fatal to her petition. Following is an accurate statement of record facts and proceedings below.

A. Underlying Facts

Reynolds began working for Olsten Temporary Services in November 1991. In February 1992, Olsten offered Reynolds an assignment in the medical records file room at CSXT. Reynolds' duties included filing medical records in files maintained for company employees. CSXT's anti-harassment policy was posted on all bulletin boards on all floors, including the second floor where Reynolds worked.

Temporary workers performed some or all of the work in the medical records file room from 1988 to 1993. Because of concerns with employee confidentiality, Dr. Thomasino, Chief Medical Officer, preferred non-union represented individuals for handling the files. The 50,000 employee files contained sensitive medical information such as results of drug tests and whether employees could return to work. Because union members frequently moved in and out of jobs, Dr. Thomasino felt that a breach of confidentiality could more likely occur if union members held those jobs. As a result, union employees had not worked in the file room. Also, there was a freeze on promoting union-represented people and putting them into entry-level staff jobs, such as these. Accordingly, temporaries were used to perform the filing duties.

When Reynolds began work, the other temporaries in the file room were Vicki Allen, Darlene Davis, and Mindy Jennings. The Administrative Services Department, not the Medical Department, managed the file room. Roger Widney, Records Supervisor, was the Administrative Services employee responsible for maintaining the files. Widney reported to Les Backherms, Manager

Administrative Services, who reported to Jim Duguid, Director Administrative Services. Duguid reported to Susan Hamilton, Senior Assistant Vice President, Administrative Services.

The Eleventh Circuit's recitation of Widney's objectionable conduct toward Reynolds at pages 863 to 864 of its opinion correctly states the evidence viewed in a light most favorable to Reynolds. On the last of these isolated incidents, which occurred March 25 or 26, 1992, Reynolds left the file room and complained about Widney to Jay Jackson, a claims manager in the General Claims Department on the second floor, who was also an African Methodist Episcopal minister.[1]

Reynolds admitted Jackson took her complaint seriously; he told her he knew someone who could look into it and would contact her. Jackson referred the complaint to Greg Lunn, Assistant Manager EEO in CSXT's Employee Relations Department. Lunn met confidentially with Reynolds, Davis and Allen that day or the next day. Lunn told Reynolds he would refer the information to someone who would investigate it.

Elaine Tisdale, Senior Director Employee Relations, was responsible for investigating such complaints in the Administrative Services Department. Tisdale interviewed the temporaries within a few days of the complaint. During the interviews, Tisdale asked the temporaries how she could help, and they responded that they wanted the conduct to stop.

Susan Hamilton removed Widney from the medical records file room and from any supervisory duties, gave him a stern verbal warning, and required him to attend sensitivity training. Widney

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1. The Eleventh Circuit did not find that Widney "made statements to Ms. Reynolds indicating that if she did not put up with his sexually inappropriate conduct, she would lose her job with CSXT" (*see* Petition at 4); rather, it found that Reynolds "testified that certain comments by Widney gave her the impression that a complaint would be ineffectual."

was given a job working alone in the general claims file room on the second floor. Lana Brantley replaced Widney in the medical records file room. Reynolds liked Brantley, saying that she was "very nice" and "a good supervisor." Reynolds never complained to Brantley about Widney.

Widney had to train Brantley, but before that training was complete, Dr. Cook in the Medical Department confronted Widney about a filing error that Widney believed Reynolds had made. Widney asked his supervisor, Backherms, what he should do. Backherms discussed the matter with Duguid. After discussing the matter with Backherms and Duguid, Widney called Olsten, which assigned a different temporary to CSXT. Widney testified he believed that it was Reynolds who made the filing mistake but did not know the identity of the person who had complained to the Employee Relations Department. However, Reynolds testified that when she went back to collect her personal belongings, she heard Widney state to Jennings, "let me see if she's going to run upstairs on sexual harassment now."

Reynolds misstates the record concerning Backherms and Duguid. Backherms confirmed that Widney came to him expressing concerns as to Dr. Cook's objections about misfiling. Widney told Backherms that Reynolds was responsible for that filing. Backherms told Widney he needed to talk to his boss since Reynolds worked for Olsten and already had worked at CSXT for about two months. R13-88.

Backherms told Duguid about Widney's concerns with Dr. Cook's objections. R13-89. Duguid said that if they weren't satisfied with a temporary employee, they should just notify Olsten for an exchange. *Id.*

Neither Duguid nor Backherms knew who complained about Widney. R13-63, 89. Indeed, Backherms testified that Duguid asked him whether Reynolds was the person who had complained. R13-

90. Duguid also testified that they discussed the possibility that Reynolds was the person who had complained, and that replacing her could be considered retaliation. R13-35-37. After considering this possibility, Duguid and Backherms decided that Reynolds could not be the person (R13-89 to 90), and both testified that they did not think that replacing Reynolds sounded or looked like retaliation. R13-37, R13-90-91. Reynolds was not the first temporary that Widney had asked Olsten to replace. R13-87. Other temporaries had been replaced in the past because of mishandling and misfiling files. R10-173. Furthermore, Duguid explained that when the Medical Department complained, they generally replaced the temporary. CSXT did not progressively discipline temporaries, but looked to the temporary agency to provide someone else. R13-65 to 66. After talking with Duguid, Backherms told Widney that he could call Olsten to ask if they would send a replacement. R13-91. Duguid thought that Lana Brantley was going to make the call. R13-36. No witness contradicted Backherms' and Duguid's testimony concerning their thought processes.

On April 16 or 17, 1992, Tisdale learned that Reynolds had been replaced. She immediately left a message on Reynolds' answering machine telling her that she would get back in touch after she investigated. Tisdale soon concluded that Reynolds should be brought back and paid for the lost time. Hamilton, who did not like the appearance created by replacing Reynolds, agreed. She apologized to Reynolds, and Reynolds returned to work April 23, 1992. Reynolds was later paid for her lost time.

CSXT was more concerned for Reynolds than for any appearance of guilt caused by bringing her back, as Hamilton testified:

> Q. [By CSXT'S counsel] You've been asked a lot . . . about Arlene Reynolds returning to the file room, returning to work. . . . Weren't you concerned that by bringing her back, it would

> look like the company had done something wrong? Was guilty of something?
>
> A. Well, I couldn't worry about that because the right thing to do was to bring her back. I owed her an apology. I owed her the opportunity, if she wanted to come back . . . .

CSXT disciplined Widney further for his part in Reynolds' replacement. Hamilton prepared a written reprimand for his file and fined him five percent of his pay for six months. Backherms was reprimanded and lost fifty percent of his 1992 bonus. Duguid was also reprimanded.

Reynolds admitted that after she complained of Widney's conduct on March 26 or 27, 1992, he never said anything to her or touched her inappropriately again. As the Eleventh Circuit noted in its opinion, Reynolds' trial testimony about whether she complained about Widney between March 1992 and when she filed her JEOC charge contradicted her deposition testimony and changed again during an overnight trial recess. Nevertheless, the Eleventh Circuit credited Reynolds' testimony that during this period, Widney looked in the file room and stared at her when Brantley was there, whistled in an irritating manner, and bumped[2] into her when passing her without saying excuse me.

In September 1992, Reynolds filed a charge of discrimination

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2. According to Reynolds bumping did not mean touching:

> Bumps — you know, he was bumping into us like we had to pass each other. Because the way the department is built, it's built to where you can't help but to run into somebody, not one time a day but several times. It was a job where you didn't stay in your seat. You constantly ran back and forth to one end of the Medical Department to the other end, which is that, where he was at.

in which she complained that Widney continued to engage in inappropriate conduct. Tisdale investigated the charge. CSXT then moved Widney to the ninth floor to perform a job that had just become available. Hamilton felt that this would alleviate any remaining awkwardness between Widney and the temporaries.

Reynolds worked at CSXT until February 1993, when Hamilton replaced Reynolds, Allen, and three other file room temporaries who were assigned to CSXT after Widney had been removed. The positions were filled with employees who were losing their own jobs in a downsizing. If these employees had not found employment, they would have been furloughed or would have lost their jobs. Hamilton testified that the union's agitation that CSXT employees were not working in the jobs was also a factor that led to her decision. When CSXT employees assumed the file room duties, file room supervision was turned back over to the Medical Department, which Dr. Thomasino had wanted for a long time. Jennings, who at that time was assigned as a temporary to the Medical Department, was also replaced. Around the same time, surplus employees were also absorbed in the real estate area on a labor intensive project where the plan had been to use temporaries. R15-28 to 29. It was part of Hamilton's responsibility to help find individuals other jobs within the company. R15-29 to 30.

The Eleventh Circuit rejected as a matter of law Reynolds' attempt to show pretext by relying on the "position paper" that Duguid wrote in the fall of 1992 about the use of temporary employees. 115 F.3d at 868. Despite Reynolds' selective and argumentative comments about it in the Eleventh Circuit and in her petition at 28 to 30, Duguid's paper represented a two to three month effort to gather data and analyze and outline issues relating to the use of temporary employees. PX 19; R13-54 to 58. Hamilton testified that her superior, Gerry Nichols, asked Duguid to prepare the report to examine the use of temporary employees as a part of a review of corporate expenses. R12-168. In fact, Duguid's job duties included responsibility for reviewing numerous items of

expense to the company. *Id.* Among the alternatives that Duguid considered was replacing the temporaries in the file room and the temporaries who supported the Medical Department with "surplus employees." PX 19, at 3. Ultimately, as Hamilton (the decision maker) explained at trial, non-union or "staff" employees replaced the temporaries then in the file room and Jennings, who at that time was assigned to the Medical Department. Most of the other temporaries discussed in Duguid's paper worked at CSX Technology, a separate company not within Hamilton's responsibility. R12-175.

The factors leading to Hamilton's decision to replace the temporaries were uncontradicted. If the employees who were losing jobs elsewhere in the company had not found employment, they would have been furloughed or would have permanently lost their jobs. Therefore, although temporaries are sometimes less expensive, as recognized by Duguid's paper, the employees who began working in the file room in February 1993 would have been entitled to a buyout (an expense to the company) and continued insurance benefits if they left. Alternatively, they could have "pulled back on their union seniority," which could have led to the possibility of a paid furlough. As Hamilton testified, it made economic sense to find them jobs rather than to face the possibility of paying them for doing no work or in a buyout.

Within three weeks after she left CSXT, Olsten assigned Reynolds to a position she liked at an insurance company with better overtime opportunities. While working there, Reynolds filed a second charge of discrimination asserting that CSXT retaliated against her for filing her first charge.

B. Proceedings in the District Court

Reynolds filed a complaint on September 20, 1993, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. Reynolds filed an amended complaint

adding various tort claims against CSXT, all of which were later dismissed or dropped. A second amended complaint alleging racial harassment under 42 U.S.C. § 1981 was allowed July 18, 1994.

At trial, Reynolds raised two theories of liability for harassment, namely "knew or should have known" and a "mixed case" theory. On appeal, she abandoned the second theory.

At the close of all the evidence, Reynolds sought judgment as a matter of law "on the issue of the mixed environment quid pro quo strict liability basis . . ." R15-65. She contended that "Mr. Widney's act of retaliation established a quid pro quo case or a mixed case which would include quid pro quo and hostile environment." R15-66.

When her motion was denied, Reynolds' counsel requested a jury instruction and an addition to the verdict form on what he labeled "strict liability" and "direct liability," stating:

> "In a quid pro quo case, a supervisor is an agent of the corporation because he exercises the authority actually delegated to him by his employer by making or threatening to make decisions affecting the employment status of his subordinates," citing *Sparks*. "When this occurs, the corporate defendant is strictly liability for the acts of the supervisor," citing *Steele*.
>
> "Similarly, in a mixed case involving both quid pro quo and hostile environment and sexual harassment, strict liability applies," citing *Steele*.

R15-74. Reynolds was reading from the district court's earlier denial of CSXT's motion for summary judgment.

The district court declined this request, stating:

> It seems to me there's absolutely no evidence in this case of a quid pro quo type of gender discrimination . . . as distinguished from an abusive or hostile work environment form of gender discrimination. . . .

The district court asked Reynolds' counsel:

> You are making a claim that this is a mixed case, but there's no evidence, is there, of any demand for sexual favor by the defendant?
>
> Reynolds' Counsel: There was a demand that the plaintiff surrender her federally protected rights, or she was threatened with termination.
>
> The District Court: But not as a demand for sexual favor of any kind. Was there?
>
> Reynolds' Counsel: No, sir. But, Your Honor, may I please read what you say — in denying the motion for summary judgment, you say, "In view . . ." — and this is on page 4 of your order. "In view of the relevant law, two issues require resolution here. The first is whether Widney possessed actual or apparent authority to hire, fire, discipline, or promote," quoting Henson. "If so, a second issue arises; namely; whether any evidence exists indicating that Widney explicitly or implicitly threatened to use his authority against the victim," quoting Sparks. And, Your Honor, that's all we're asking here, is that these issues be —
>
> The District Court: But implied in that last statement is a demand for sexual favor. And there just hasn't been any in the evidence in the case now that it has been tried, in my view. So I'll not alter the [jury] interrogatories in that respect.

The district court therefore instructed the jury that CSXT could be liable for a hostile or abusive work environment if it "knew or should have known of the alleged sexual and/or racial harassment, and failed to take appropriate remedial action."

CSXT appealed the jury finding of liability under a "knew or should have known" theory. Reynolds filed a cross appeal and listed nine proposed issues in her Civil Appeal Statement Form. Issues one through three related to "mixed" sexual harassment. For example, the first issue was "[w]hether the District Court erred by concluding that Plaintiff's allegations of sexual harassment did not constitute a case of 'mixed' sexual harassment?"

In her brief to the Eleventh Circuit, however, Reynolds abandoned *any* alternate theory. In her answer brief, Reynolds stated:

> Reynolds agrees that there are five elements of a cause of action for hostile environment sexual harassment, as set forth in CSXT's Initial Brief.

This was in response to CSXT's initial brief, which set forth the five part "knew or should have known" test, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989):

1. Reynolds belonged to protected group;

2. She was subjected to unwelcome sexual harassment;

3. The harassment was based on sex;

4. The harassment affected a term, condition or privilege of employment in that it was sufficiently severe or pervasive to alter the conditions of

> employment and create an abusive work environment; and
>
> 5. CSXT knew of the problem and failed to take prompt remedial action.

Reynolds' answer brief contained no argument, either on the main appeal or on cross appeal, that the Eleventh Circuit should affirm the district court judgment on any alternate theory of liability.[3]

C. The Decision of the Court of Appeals

The Eleventh Circuit decided three issues. First, the Eleventh Circuit determined that the evidence was legally insufficient to show that CSXT knew of harassment and failed to take prompt remedial action. In focusing its analysis, the Eleventh Circuit specifically recognized the limited nature of plaintiff's claims, stating in footnote 4 that: "Reynolds's hostile environment claims were based on direct, rather than indirect liability." 115 F.3d at 866.

The Eleventh Circuit held that CSXT knew or should have known of Widney's conduct only when Jackson reported Reynolds' complaint, but that:

> A reasonable juror could not find . . . that the acts taken by CSXT, including immediate demotion, warning, transfer, and order to attend sensitivity

3. Just 10 days before the Eleventh Circuit's decision, Reynolds mailed a Notice of Supplemental Authority favorably citing the new decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 66 U.S.L.W. 3351 (1997) (which she now claims is wrong). Although a notice of supplemental authority would not have preserved the issue (*see* page 15 below), Reynolds did not assert that any theory of liability should apply other than the "knew or should have known" theory she had conceded applied.

> training, did not constitute prompt action "reasonably likely to prevent the misconduct from recurring." Therefore, we conclude that the district court erred in denying CSXT's judgment as a matter of law as to the hostile environment claims.

115 F.3d at 868.

On a second issue, the Eleventh Circuit held that although a reasonable juror could find that Reynolds' 1992 complaint and replacement "were causally connected," Reynolds failed to present legally sufficient evidence to support the claim for retaliation in CSXT's 1993 replacement of all of its medical records file room temporaries with permanent CSXT employees. Therefore, the court upheld the $200 award relating to Reynolds' mental pain and suffering for her temporary replacement but vacated the judgment for $900 in lost wages relating to the second alleged retaliation.

On a third issue, the Eleventh Circuit reversed the district court's denial of a motion for judgment as a matter of law on punitive damages for retaliation. The court held that Reynolds presented no evidence of "malice" or "recklessness," except for, "plausibly," Widney's:

> In fact, the evidence shows just the opposite: CSXT posted its anti-harassment policy on the bulletin boards located on all floors, took Reynolds's complaints seriously, immediately reprimanded Widney for the part he played in having Reynolds replaced, invited Reynolds back to work within one week of her replacement, and paid her for the days she missed because of the replacement.

115 F.3d at 869.

After the Eleventh Circuit rendered its June 20, 1997 decision,

Reynolds filed a Petition for Rehearing but did not criticize the Eleventh Circuit's failure to analyze an alternate theory of liability.

REASONS FOR DENYING THE WRIT

This case does not present the questions stated in the petition. Reynolds did not pursue an agency theory of liability below, and the court of appeals did not decide that issue. Therefore, the Eleventh Circuit's decision is not in conflict with decisions applying agency principles. On punitive damages, the conflict between the circuit courts of appeal urged by Reynolds does not exist, and the Eleventh Circuit's application of the statute to the facts demonstrates the fallacy of Reynolds' per se rule. Finally, this is not the extraordinary case that justifies this Court's review of factual determinations.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER AN "AGENCY" THEORY OF EMPLOYER LIABILITY NOT RAISED TO OR DECIDED BY THE ELEVENTH CIRCUIT.

A. "Agency" Theory Of Employer Liability Not Preserved.

This Court does not take up issues not raised to or passed on by the court below. *E.g.*, *United States v. Wells*, __ U.S. __, 117 S. Ct. 921, 137 L. Ed. 2d 107, __ (1997); *EEOC v. FLRA*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19 (1986); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 1155, 67 L. Ed. 2d 287 (1981); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589, 45 L. Ed. 2d 623 (1975).

Reynolds never argued to the Eleventh Circuit that the verdict in the district court could have been sustained on a theory of "indirect liability," a phrase the Eleventh Circuit uses for the vicarious liability of an employer for harassment by a supervisor

under agency principles. Reynolds now tries to bootstrap the discussion of agency principles in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 139 L. Ed. 2d 337 (1997), onto her case by stating that the Eleventh Circuit based its decision on the "intervening" *Faragher* case. Petition at 9. The Eleventh Circuit did not rely on any agency theory discussed in *Faragher*, and Reynolds cannot fairly criticize the Eleventh Circuit for failing to apply a theory she never raised.

Reynolds dropped even her "mixed" harassment argument (an argument conceptually different from the one she currently espouses) when she agreed with CSXT's "knew or should have known" statement of the liability issue and asserted no alternative theory in her brief. In the Eleventh Circuit, an issue must be briefed to be considered. *See Lewis v. Secretary of Agriculture*, 73 F.3d 312, 317 n.2 (11th Cir. 1996); *McBride v. Sharpe*, 25 F.3d 962, 970 (11th Cir.), *cert. denied*, 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 401 (1994). Rule 28(a)(6), Federal Rules of Appellate Procedure, when read with Rule 28(b), requires that each brief contain an "argument" section with

> the contentions of the [appellant or appellee] on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.

Moreover, a party cannot raise an issue for the first time in a notice of supplemental authority. *United States v. Blasco*, 702 F.2d 1315, 1332 n.28 (11th Cir.), *cert. denied*, 464 U.S. 914, 104 S. Ct. 275, 78 L. Ed. 2d 256 (1983).

Consistent with the briefs, the Court of Appeals expressly stated in footnote 4 of its opinion that Reynolds's hostile environment claims were based on direct, rather than indirect, liability. Reynolds failed to disagree with the Eleventh Circuit's characterization in her Petition for Rehearing, which

> must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present.

Fed. R. App. P. 40(a). Therefore, the petition should be denied as to the first issue.

B. The Eleventh Circuit's Opinion Does Not Conflict With The Decision Of Another Circuit.

After blaming her failure to preserve an agency theory on the Eleventh Circuit and implying that her case presents an agency theory simply because *Faragher* did, Reynolds next surveys the decisions of the courts of appeal regarding agency principles in an attempt to create a conflict that does not exist.

Because the "matter" on which Reynolds now seeks certiorari jurisdiction was not raised, and the Eleventh Circuit did not consider it, that court did not enter "a decision in conflict with the decision of another United States court of appeals on the same important matter." Reynolds' real argument is that *Faragher*, not *Reynolds*, is in conflict with decisions of other courts of appeal. Petition at 11. *See also* Petition at 13 ("the Eleventh Circuit's determination [regarding the word 'aided' in *Faragher*] is in error, and in direct conflict"). The alleged conflict between *Faragher* and decisions of other circuits does not help Reynolds because in this case, the Eleventh Circuit cited *Faragher* simply to refer to the "knew or should have known" standard, for which *Faragher* acknowledges the Eleventh Circuit's earlier decisions in *Henson* and *Steele*.

Moreover, the decision in *Faragher* is not in conflict with the court of appeals decisions cited by Reynolds. The standard articulated in *Faragher* does not conflict with the principles articulated in those cases, and there were no facts in *Faragher*

showing that the alleged harassers used or relied on their supervisory authority in accomplishing the harassment.

C. The Facts Presented And Decided In The Appeal Fail To Support Liability Under An Agency Theory.

The pertinent facts found by the Eleventh Circuit would not support liability under an agency theory in any event.

Reynolds now argues that the Eleventh Circuit:

> should have affirmed the jury's finding . . . because Widney was aided in accomplishing the harassment by the existence of the agency relationship between CSXT and himself.

Petition at 17. She further contends at page 18, footnote 8, that the Eleventh Circuit:

> acknowledged that Widney threatened Ms. Reynolds and the other temporary employees' jobs if they complained about his sexually inappropriate conduct . . . .

The Eleventh Circuit made no such holding. Rather, the court adopted Reynolds' statement about Widney's comments in her brief almost verbatim:

> Reynolds . . . . testified that certain comments made by Widney gave her the impression that a complaint would be ineffectual. Reynolds testified that, for example, Widney would say "what goes on in the file room stays in the file room" and that if any complaints were made to his superiors, the superiors would back him up. Widney also stated from time to

> time something to the effect of "the first to complain will be the first to go."

115 F.3d at 863. In her Eleventh Circuit brief, Reynolds presented no facts linking such statements by Widney to any sexual comments or behavior towards her; nor did Reynolds cite any evidence that Widney made threats that he would dismiss her if she would not allow him to engage in sexually oriented conduct.

Reynolds asserts that the cases cited for conflict with *Faragher* hold that an employer is liable under agency principles if the supervisor uses actual or apparent authority to further the harassment or is aided in accomplishing the harassment by the existence of the agency relationship. Reynolds did not argue below, and the Eleventh Circuit did not find, that Widney's comments making the temporaries feel that complaints about him would be ineffectual aided him in accomplishing any harassment of Reynolds. To the contrary, Reynolds complained about Widney, and the conduct she complained about stopped. Likewise, Widney's subsequent replacement of Reynolds did not aid him in engaging in sexually harassing conduct: he never engaged in any sexually-oriented conduct again; Reynolds was invited to return; and Widney was punished. In summary, the Eleventh Circuit found no "threats to condition the plaintiff's future employment upon submission to inappropriate sexual conduct" as asserted by Reynolds. Petition at 17 to 18. Widney's conduct simply gave rise to a retaliation claim for which CSXT was found liable.

Reynolds' current, unpreserved, position reduces to this: Widney's retaliatory act, caused by Reynolds' protected activity, automatically supports liability for hostile work environment sexual harassment based on agency status. No circuit has applied such a principle, making this unpreserved issue that is not in conflict with other courts of appeal even more inappropriate for certiori review.

II.

REVIEW IS NOT NEEDED TO DETERMINE WHETHER PUNITIVE DAMAGES ARE ALWAYS RECOVERABLE IN A CASE WHERE THERE IS LIABILITY FOR COMPENSATORY DAMAGES FOR A FIRST LEVEL SUPERVISOR'S ACT.

The punitive damages issue involves only the claim for retaliation relating to Reynolds' replacement in the file room for one week. Reynolds bases her petition on an alleged conflict between the Eleventh Circuit's determination and decisions of the Seventh, Eighth, and D.C. Circuits. No conflict exists. None of the cases relied on for conflict decided the issue before the Eleventh Circuit in this case: assuming that "malicious" or "reckless" conduct by a first level supervisor is sufficient for punitive damages, does the evidence also support punitive damages against the employer?[4] Rather, *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996); and *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), all involve determinations of whether the quantum of evidence *in those cases* was sufficient to sustain punitive damages; none addressed a specific supervisory level at which such damages would always be sustained. In fact, the legal standards they apply for punitive damages (to different facts) are readily harmonized with *Reynolds*.

In *Reynolds*, the Eleventh Circuit held that CSXT was not liable for punitive damages based on the act of Widney, which the court labeled as "plausibly . . . 'malicious' or 'reckless.' " Like each of

4. Reynolds embeds in the issue her unsupported factual argument that "upper management . . . expressly approv[ed]" the supervisor's "causing the discharge" in the "Questions Presented for Review." Of course, the facts entirely negate that contention. Hamilton immediately brought Reynolds back and punished Widney, Backherms and Duguid. Moreover, Backherms and Duguid were unaware of any malicious, reckless, or even retaliatory motive by Widney.

the other courts of appeal cited, the Eleventh Circuit analyzed whether the evidence in the case at hand supported a conclusion that the corporate defendant acted with "malice or reckless disregard." As demonstrated below, established precedent holds that punitive damages *may* be imposed in a Title VII or 42 U.S.C. § 1981 case, depending on the specific facts of the case, not that they *must* be. Indeed, on January 21, 1997, this Court denied a petition for certiorari on the standard for punitive damages under 42 U.S.C. §§ 1981, 1981a. *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 767, 136 L. Ed. 2d 713 (1997).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295 (1975), this Court held that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, *under certain circumstances*, punitive damages." (Emphasis added). Punitive damages are "never awarded as of right, no matter how egregious the defendant's conduct. . . ." *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638, 75 L. Ed. 2d 632 (1983). The purpose of punitive damages is to "punish" the defendant and "deter" him and others like him from similar conduct. 461 U.S. at 54, 103 S. Ct. at 1639.

Enacting these long-standing principles, 42 U.S.C. § 1981a provides that a

> complaining party *may* recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(Emphasis added).

The decisions of the Seventh, Eighth, and D.C. Circuits that Reynolds cites likewise hold that a respondent *may* be liable for punitive damages under the discrimination laws, not that such damages are *mandated* regardless of the circumstances, once liability is allowed based on the conduct of a company employee, even if that employee is part of higher management. The per se rule ultimately advocated by Reynolds in the petition[5] was not briefed to the Eleventh Circuit, has never been the law, is not supported by any case cited by Reynolds, and contradicts the applicable statute, 42 U.S.C. § 1981a.

Reynolds relies primarily on *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997). The issue in that case was whether punitive damages are recoverable only in "extraordinarily egregious cases." *Id.* at 1437. The court rejected that standard because "evidence that suffices to establish an *intentional* violation of protected civil rights also may suffice to permit the jury to award punitive damages. . . ." 108 F.3d at 1438. In *Kolstad*, the employer's highest management engaged directly in discriminatory actions. In directing that punitive damages be submitted to the jury, the court articulated its reasoning based on specific facts of the case: the employer, acting through highest management, did not try to justify the use of sex in its promotion decision; it did not disavow the acts of its agents; and it flatly denied the allegation of "invidious sex discrimination, discrimination lying at the heart of Title VII." *Kolstad* at 1439. Nevertheless, the court expressly rejected the blanket proposition (advocated by Reynolds here) that

> evidence sufficient to establish liability under Title

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5. On pages 20 and 21, Reynolds contends that if the supervisor's act of termination was within his authority, the employer is "indirectly" liable for the supervisor's "malicious conduct." On page 21, she urges the Court to decide that punitive damages always flow when there is "evidence of intentional discrimination sufficient to establish liability under Title VII." Reynolds never presented this argument to the Eleventh Circuit and cannot raise it belatedly now.

> VII for intentional discrimination will *always* sustain an award of punitive damages under section 1981a.

Id. at 1438. (Emphasis added).

The Seventh Circuit in *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996) also rejected a heightened standard of proof for punitive damages — that the employee would have to "present direct evidence that [the district manager, who made the decisions] was aware of the fact that he was violating [the plaintiff's] civil rights when he discharged her." *Id.* at 581. Like the D.C. Circuit, the Seventh Circuit held that "[e]vidence that suffices to establish an intentional violation of protected civil rights also *may* suffice to permit the [factfinder] to award punitive damages. . . ." *Id.* (Emphasis added). The court did not hold that the employer was liable for punitive damages just because the district manager (who was at least at the third level of management in the district) retaliated against plaintiff. Rather, the necessary quantum of evidence was present, considering all of the evidence presented in the case.

Reynolds also cites *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997). That decision is not in conflict with *Reynolds*. Like the Second and D.C. Circuits, the court in *Kim* rejected the argument that punitive damages are limited to "exceptional circumstances of unusual bad motive that transcends ordinary intentional misconduct." *Id.* at 1065. The Eighth Circuit in *Kim* also rejected Reynolds' contention, stating that it did not "decide whether recovery of punitive damages under Title VII requires a 'heightened' showing beyond intentional discrimination." 123 F.3d at 1066, n.5. Moreover, the court recited at pages 1066-1067 an extensive paragraph of specific circumstances supporting an award of punitive damages against the employer for the acts of both the warehouse superintendent (who ran the company warehouse) and multiple company supervisors.

Contrary to Reynolds' assertion, these cases do not conflict with the three recent cases that the Eleventh Circuit cited in reaching its decision in *Reynolds*: *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996), *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), and *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995). Indeed, Reynolds admits that *Splunge* "is consistent with the standards for punitive damages under § 1981a." Petition at 20. Splunge involved unlawful harassment by four levels of management, the dining room supervisor up through the area supervisor. *Id.* at 489. The court determined that while management higher up in the corporate hierarchy was negligent in not stopping or preventing the harassment, the company had an anti-harassment policy and investigated complaints that it received. *Id.* at 491. Therefore, no management higher than those involved in the harassment "acted with the state of mind required by Section 1981a." *Id. Splunge* aided the Eleventh Circuit's analysis of the facts in *Reynolds* where only the lowest supervisor's acts could plausibly be "malicious" and "reckless," and the company acted immediately to rectify even an appearance of retaliation.

The other two cases the Eleventh Circuit cited in support of its decision, *Patterson* and *Fitzgerald*, are also fact-centered and can be harmonized with the decisions of the other circuits. The Fifth Circuit in *Patterson* recognized that a party "who establishes a cause of action under 42 U.S.C. § 1981 may be entitled to punitive damages 'under certain circumstances.' " 90 F.3d at 941, *quoting Johnson v. Railway Express Agency*, 421 U.S. at 460, 95 S. Ct. at 1720. The court held that the evidence did not support punitive damages because: the only individual engaging in intentional discrimination and retaliatory discharge "was not a corporate officer of PHP Healthcare, but was the 'project manager' of the Fort Hood Office"; the company had a policy prohibiting discrimination; and the company did not authorize, ratify, or approve his actions. *Id.* at 944. The court added that prompt remedial actions by an employer are important to a review of the imposition of punitive damages. *Id.* at 944, n.15.

In *Fitzgerald*, a training facilitator terminated plaintiff's continued participation in a company training program. The court attributed actions of the facilitator to the employer for compensatory damages, but held that her act was not "malicious, willful, and in gross disregard of [plaintiff's] rights" on the part of the employer to sustain punitive damages. 68 F.3d at 1263. As did the other circuits, the Tenth Circuit in *Fitzgerald* examined the specific circumstances of the case and held that the evidence did not support punitive damages. Specifically, the facilitator did not have the typical discretion of a manager; the company did not ratify or approve her acts of intentional discrimination; and the company conducted an investigation that took plaintiff's complaints seriously, although it came to the conclusion that intentional discrimination had not occurred.

As in other circuits, the Eleventh Circuit decided *Reynolds* based on the evidence presented. It said that only Widney's conduct was "plausibly" malicious or reckless. Backherms and Duguid, both below the level of assistant vice president, believed Dr. Cook complained about filing errors and did not know Reynolds was the one who complained about Widney. Temporaries had been replaced before when problems arose. These men considered but rejected the conclusion that Reynolds had been the one to complain. If Widney had a retaliatory and malicious or reckless state of mind, they were unaware of it.[6]

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6. CSXT also argued below that it could be liable for punitive damages only on the basis of the actions of a managing agent or primary owner. *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc.*, 919 F.2d 1517, 1524 (11th Cir. 1990), *cert. denied*, 502 U.S. 815, 112 S. Ct. 68, 116 L. Ed. 2d 43 (1991). Managerial authority, unaccompanied by the power to participate in the formation of company policy, does not make an employee a managing agent. *Id.* (assistant vice president of defendant not managing agent); *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th DCA 1989). Reynolds offered no evidence that either Duguid or Backherms was a managing agent of CSXT. Even if they were, the Eleventh Circuit's decision reflects that Reynolds failed to introduce any evidence CSXT acted in a manner that would support an award of punitive damages.

Further, CSXT never conceded that Backherms and Duguid were higher management or that they condoned or directed retaliatory acts by Widney, despite Reynolds' attempt to create this impression by twisting footnote 11 of the Reynolds decision. Petition at 18, 19. Footnote 11 simply noted that CSXT did not try to avoid liability for compensatory damages for retaliation on the contention that the acts were not condoned by CSXT through higher management. The Eleventh Circuit never decided that Backherms and Duguid were higher management, and the record contradicted that conclusion. As discussed in footnote 6, CSXT consistently contended that Duguid and Backherms were not "managing agents." And, as shown above, the record would not support a finding of "maliciousness" or "recklessness" on their part, or CSXT's part, even if they were. Moreover, Reynolds did not argue in her brief below that the actions of Duguid or Backherms she relies on in her Petition supported punitive damages relating to her one week replacement. Therefore, Reynolds' petition, which claims a conflict only through a gross misreading of the Eleventh Circuit's opinion and the opinions of other courts, must be denied.

This case is also a poor candidate for certiorari because the result shows a proper analysis. CSXT acted sincerely, vigorously, promptly, and effectively to protect Reynolds' rights. Each time Reynolds complained, CSXT took appropriate action. When Reynolds was replaced in the file room for one week in April 1992, Hamilton put her concern for Reynolds above any consequences or appearances that returning Reynolds to the file room would create.

In summary, no court has ruled the way that Reynolds wants this Court to rule. All of the circuit decisions Reynolds cites hold that punitive damages are not required simply because there is liability for compensatory damages. In all the cases, the circuits reviewed the specific facts to determine whether the quantum of evidence was sufficient to sustain them. Reynolds never made her current argument below. Finally, the Eleventh Circuit's decision

was consistent with the important principle that a company that takes prompt and sincere action has not acted maliciously or with reckless disregard for a plaintiff's rights. A corporation's sincere efforts which remedy workplace problems should be encouraged, not punished. Any result other than the one reached would have a devastating impact on companies that strive to prevent harm to others from their employee's actions.

III.

THIS IS NOT THE RARE CASE IN WHICH THIS COURT SHOULD REVIEW FACTUAL FINDINGS.

Rule 10 provides:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Reynolds sets forth no rationale compelling departure from established principles against granting certiorari to review factual findings. Issues which are primarily factual questions do not merit certiorari review. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8, 102 S. Ct. 216, 222, 70 L. Ed. 2d 323 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273 (1938); *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 2d 925 (1925). The limited resources of this Court dictate that it grant certiorari only

> in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real

> and embarrassing conflict of opinion and authority between the circuit courts of appeal.

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502, 71 S. Ct. 453, 455, 95 L. Ed. 479 (1951). Therefore, the petition should be denied.

In any event, the Eleventh Circuit's material findings are correct. Reynolds first criticizes the Eleventh Circuit for declining to accept her argument that a comment about another temporary heard third-hand by Linda Elson, an employee in another department, from a source Elson could not recall at trial, was "notice" to CSXT of prior sexual harassment.

Reynolds' criticism is misplaced. The Eleventh Circuit incorporated in its opinion all of the "facts" Reynolds attempts to reargue here, and it expressly viewed all evidence in the light most favorable to Reynolds. 115 F.3d at 866. Elson testified that she believed that if a complaint were brought to her attention that she construed as a "complaint of sexual harassment," she had an obligation to report it to "higher management." However, the Eleventh Circuit's finding is consistent with Reynolds' failure to establish that Elson acted unreasonably upon hearing from someone other than Turner that Widney made an inappropriate comment about Turner's pregnancy. Elson testified that she didn't repeat the information because she took it as gossip; because the temporary employee did not come forward herself to say that the comment was made; and because she did not supervise Widney and was in a completely different department. Furthermore, the Eleventh Circuit correctly noted the absence of a legal duty on the part of Elson to report this remark to higher management, regardless of her own belief that she should report "complaints."

With regard to the absence of causal connection between Reynolds' complaints and the elimination of her position in February, 1993, Reynolds also seeks certiorari by reciting selected

facts and drawing inferences that focus solely on a "Position Paper" Duguid wrote about temporaries in December, 1992.[7] The recitation of these facts is wrong and contradicts the record discussed on pages 4-5 above. The Eleventh Circuit, which had before it the entire record and the parties' briefs, properly found that replacement of temporaries with permanent employees losing their jobs elsewhere was legally insufficient to establish a causal connection. This part of the petition is no more than a reargument of facts and inferences already decided by the Eleventh Circuit, and Reynolds' petition must be denied.

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7. Reynolds seeks to misdirect the Court by placing exaggerated emphasis on one sentence in the Eleventh Circuit's factual recitation. Reynolds states that the "single most important erroneous factual finding" by the Eleventh Circuit was that Hamilton further testified that CSXT planned to relocate the temporary staffers to the real estate area, which was in need of more workers for a particular project." While the Eleventh Circuit's statement is slightly misworded, the actual testimony was even stronger in CSXT's favor: other *surplus* employees (such as those who were replacing the temporaries in the file room and one in the Medical Department) were going to work in the real estate area on a project where the plan had been to use temporaries. Reynolds does not explain how correcting this slight miswording would help her demonstrate a causal connection between her complaints and the elimination of her position.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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